90-641

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REGINALD G. ADDISON,
KAREN E. KOSKOFF,
RALPH J. PERROTTA,
JOANNE D. SLAIGHT,
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
Petitioners

v.

FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a Federal Trade Commission remedial order may, consistent with the First Amendment, prohibit mere advocacy, otherwise lawful, particularly by persons who have no economic stake in the views expressed?

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No. 90-

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FEDERAL TRADE COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Addison et al. respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dated March 16, 1990.

OPINIONS BELOW

The judgment appealed from is the unreported March 16, 1990 judgment of the court of appeals (App. 1a-2a). That judgment affirmed without opinion the Federal Trade Commission's Final Order dated June 23, 1986 (App. 3a-6a), which is reported at 107 F.T.C. 510. The portion of the FTC's opinion relevant to the scope of

relief (the only issue presented by this petition) is reported at 107 F.T.C. 510, 599-602, and appears in the appendix at 7a-12a. The entire FTC opinion, reported as cited above, was reprinted in the appendix to the petition for certiorari in No. 88-1198, when this case was previously before this Court as to the existence of a violation.[1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals (App. 1a) was entered on March 16, 1990. A timely petition for rehearing was denied on October 2, 1990 (App. 18a), after an initial denial was vacated for lack of notice (App. 16a). This petition is filed within ninety (90) days of the court of appeals' October 2, 1990 order.[2] In

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[1] Only those opinions and orders, or portions thereof, directly relevant to this petition are included in the attached appendix. References thereto will be "App. ——." The appendix to the petition for certiorari in No. 88-1198 contains the opinion, order, and judgment of the court of appeals on the existence of a violation (reported at 826 F.2d 226), the FTC's Final Order and opinion (reported at 107 F.T.C. 510), and the Initial Decision and findings of the Administrative Law Judge (also reported at 107 F.T.C. 510). The occasional references herein to background facts from those earlier opinions are cited both to the published sources and to "No. 88-1198 App. ——."

[2] The original order denying the petition for rehearing was entered May 23, 1990. As the court of appeals acknowledged (App. 16a), no notice of such denial was given to petitioners or their counsel. Petitioners learned of the denial on August 24, 1990, and filed a motion to vacate on the next business day (*Id.*) The court of appeals granted the motion on October 2, 1990, and, on the same day, entered a new order denying the petition for rehearing. (App. 16a-18a).

This Court has stated that when the time for taking an appeal has expired, "it cannot be arrested or called back by a simple order of court." *Old Nick Williams Co. v. United States*, 215 U.S. 541, 543 (1910) (quoting *Credit Co. v. Arkansas Central R. Co.*, 128 U.S. 258, 261 (1888)); *Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145 (1906); *accord Missouri v. Jenkins*, 110 S.Ct. 1651, 1662 (1990); *Wayne United Gas Co. v. Owens-Illinois*

the alternative, petitioners hereby move for an extension of time to the date hereof to file their petition for certiorari. This petition is filed within sixty (60) days of the end of the ninety (90) day period beginning May 23, 1990, the date the initial order denying petition for rehearing was entered. The Court has discretion, for good cause shown, to extend by sixty (60) days the original 90-day appeal period (28 U.S.C. § 2101(c); Rule 13.2 of this Court), and the requirement of Rule 30.2 that an application for such an extension be made within the original period sought to be extended is not jurisdictional.[3] Petitioners respectfully submit that the Court of Appeals' failure to notify them of the initial denial of petition for rehearing is good cause for extension beyond the 90-day period beginning May 23, 1990.

Glass Co., 300 U.S. 131, 137 (1937). It has stated such a proposition, however, only where a party or parties failed, due to their own oversight or strategy, to file a timely appeal, and later sought to redeem their appeal right through a court order entered *nunc pro tunc*. Such a proposition has no applicability here. Indeed, in *Old Nick Williams Co.*, the Court took pains to note that "[t]he delay in the present case . . . was not the act of the court, but of petitioner." 215 U.S. at 545.

[3] The language of § 2101(c) does not require that applications for extensions of time be made within the original ninety day period. This Court has expressly stated that its Rules are not jurisdictional, and has waived time requirements under its Rules. *See Deal v. Cincinnati Bd. of Education*, 402 U.S. 962 n.1 (1971) (Douglas, J., dissenting from denial of certiorari) ("We can and do waive time requirements under the Rules"); *Durham v. United States*, 401 U.S. 481 (1971) ("[T]imeliness under our rules, of course, presents no jurisdictional question"); *Schact v. United States*, 398 U.S. 58, 64 (1970) ("The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require"; petition for writ of certiorari in criminal case filed 101 days out of time was allowed after presentation of uncontroverted affidavits filed with petition showing good faith and that delay was beyond petitioner's control). That the delay here was in good faith and outside petitioners' control is clearly established by the findings of the court of appeals. (App. 16a)

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990) (*"SCTLA"*), this Court held that Petitioners Addison et al. had engaged in a boycott of the Criminal Justice Act ("CJA") program that was unlawful *per se* under the antitrust laws. The history of that boycott is documented in the record before the Court in that case. *Id.* at 770-74. Left unresolved in that opinion were Petitioners' objections to the scope of the FTC's Order; the Court of Appeals was instructed to review such objections on remand. *Id.* at 782 n.20.

The Order complained of (App. 3a-6a), which had been entered by the FTC back in June 1986, forbids each Petitioner from agreeing with anyone to "discourage," "encourage," "advise," or "suggest" specified conduct.[4]

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[4] Section I of the Commission's Order provides, in relevant part, that Petitioners

> shall cease and desist from entering into, continuing, cooperating in, or carrying out any agreement, understanding, or planned common course of action, either express or implied, to:
>
> * * * *
>
> C. . . . discourage any person from providing legal services in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;
>
> D. Encourage, suggest, advise or induce respondent [SCTLA], any member of [SCTLA], or any other person to engage in any action prohibited by this Order . . . .

Nothing in the Order limits that ban to speech that is an integral part of an unlawful course of conduct or to Petitioners that have any pecuniary interest to advance by their advocacy. Two months after this Court's decision in *SCTLA*, while the parties were negotiating over the scope of the FTC Order, the Court of Appeals, *sua sponte*, issued an order without opinion affirming and enforcing *in toto* the FTC Order as originally entered. (App. 1a-2a).

REASONS FOR GRANTING THE PETITION

The FTC's attack on speech *simpliciter*—discouraging, encouraging, advising, or suggesting—not only transgresses elementary First Amendment principles, but at its worst flies directly in the face of the law of this case. This Court's decision in *SCTLA* made clear that a political boycott by persons without an economic stake in the outcome is protected First Amendment activity.[5] Yet the FTC Order bans the mere *speech* of Petitioners who now have little, if any, such stake and, under the law enunciated in *SCTLA*, are not even capable of *boycotting* unlawfully.[6]

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[5] In *SCTLA*, 110 S. Ct. at 776-78, this Court noted with approval its decision in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 914 (1982), in which it held that a "nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself" was entitled to the protection of the First Amendment. *SCTLA* expressly distinguished *Claiborne* on the ground that "[t]hose who joined the *Claiborne Hardware* boycott sought no special advantage for themselves," whereas the "clear objective of the [SCTLA] boycott [was] to economically advantage the participants." 110 S. Ct. at 778.

[6] Petitioner Koskoff has, for the last several years, been with a law firm in Bridgeport, Connecticut that specializes in medical malpractice and other fee-generating tort cases. Petitioner Perrotta left CJA practice several years ago to take a position with the Attorney General's office in Rhode Island. He has since left that position, remaining in Rhode Island to teach, write a book, and practice law; only rarely does he take a CJA case. Thus any

Such a restraint on pure, noncommercial speech would seriously restrict political discourse. Petitioner Perrotta, for example, previously ran for public office in Rhode Island (Initial Decision Finding No. 5, 107 F.T.C. at 518, No. 88-1198 App. at 148a-49a) and now lives there again. If he should become an elected official, the FTC Order would bar him even from the words of encouragement and advice that Petitioners received from public officials in this case.[7] So, too, Section I.D. of the Order would bar the Petitioners from saying what Wiley Branton, then Dean of Howard University Law School, said when the CJA lawyers contacted him for advice in light of the traditional leadership role of the school and its dean respecting civil rights and civil liberties issues.[8] Section I.C. goes even further. If an "uptown" law firm without any economic stake in the level of fees paid to CJA counsel had asked the advice of Dean Branton and his colleagues or assistants as to whether it should volunteer for uncompensated court appointments during a

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advocacy they may undertake on behalf of improvements in the system for delivering legal services to the poor would not be motivated by any pecuniary interest.

[7] As the Court of Appeals noted in an earlier phase of this case: "The record demonstrates that Mayor Barry and other important city officials were sympathetic to the boycotters' goals and may even have been supportive of the boycott itself." *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 251 n.35 (D.C. Cir. 1988), *rev'd*, 110 S. Ct. 768 (1990) (No. 88-1198 App. 54a).

[8] As found by the Administrative Law Judge:

> Dean Branton believed that the prospects of passage for such legislation [increasing the rate of compensation for CJA work] were poor since there was no compelling political reason for generating the funds necessary for the increase. . . . The thrust of his message was that because helping indigent criminal defendants is a politically unpopular cause and the city was not having any problems in getting its cases processed, it was going to be necessary for CJA attorneys to 'raise hell.'

Initial Decision Finding 40, 107 F.T.C. at 535-36, No. 88-1198 App. 181a.

strike by CJA lawyers, any advice discouraging such volunteering would have been prohibited, had he been subject to the FTC Order.[9]

The First Amendment's protection of free speech can only be limited in certain exceptional circumstances, as when there is a showing of compelling state interest, *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533-34 (1980); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), or when speech is directed to "inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (per curiam) (emphasis in original) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). Even under such exceptional circumstances, a limitation of the First Amendment's guarantees will not be sustained when the desired end can be more narrowly achieved. *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *cf. In re R.M.J.*, 455 U.S. 191, 203-04 (1982) (even with respect to commercial speech, restrictions must be no broader than reasonably necessary to prevent the harm).

The First Amendment does not lose all viability simply because a remedial order is involved. Even in the area of commercial speech, it is well established that "first amendment considerations dictate . . . restraint in formulating remedial orders which may amount to a prior restraint on protected commercial speech."[10] Such restraint is needed here.

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[9] Petitioners hope that the FTC would disclaim any intent to reach such conduct. But informal assurances provide little comfort against the chill of the literal terms of such an order.

[10] *Standard Oil Co. v. FTC*, 577 F.2d 653, 662 (9th Cir. 1978); *accord National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Beneficial Corp. v. FTC*, 542 F.2d 611, 618-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). These cases flow from this Court's decisions in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*

The provision of legal services to the indigent is an important matter of public concern. Having made personal sacrifices to engage in this public service, many CJA lawyers continue to care deeply about the CJA system long after they have departed CJA practice. By reaching pure speech on a matter of such concern, the FTC Order—perpetual in its relevant terms and backed by the threat of financial ruin for these small practitioners [11]—chills public debate more than is necessary. The FTC and the court below should be required to modify the Order to allow Petitioners to speak freely on an issue about which they care deeply and have considerable knowledge.

In remanding this case to the Court of Appeals, this Court stated that "the Court of Appeals should review respondents' objections to the form of the order entered by the Commission." 110 S. Ct. at 782 n.20. The failure of the FTC and the Court of Appeals to limit the Order by accepted First Amendment principles, and by the principles set forth in *SCTLA* itself, calls for an exercise of this Court's power of supervision.[12]

Council, 425 U.S. 748 (1976), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which made clear that the First Amendment protects even commercial speech from unnecessary regulatory intrusion.

[11] Civil penalties of up to $10,000 per day may be assessed for violation of an FTC order. 15 U.S.C. § 45(*l*).

[12] Petitioners respectfully suggest that such supervision may properly be exercised by way of summary vacatur or reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 19, 1990

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Petitioners

v.

FEDERAL TRADE COMMISSION,
Respondent

Petition for Review of an Order of the Federal Trade Commission

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Before: Silberman and D. H. Ginsburg, *Circuit Judges*, and Robinson, *Senior Circuit Judge*

JUDGMENT

[Filed Mar. 16, 1990]

On writs of certiorari to this Court, which had on August 26, 1988, vacated a decision of the Federal Trade Commission in the above captioned matter, 826 F.2d 226, the Supreme Court reversed in part and remanded for further proceedings. 58 U.S.L.W. 4145 (Jan. 22, 1990). The issue on remand, which we did not reach in our earlier decision, is whether "the Commission's order is overly broad and not reasonably related to the remedial purposes of the [Federal Trade Commission Act]." 856 F.2d at 253.

Upon consideration of the foregoing, and of the parties' briefs, which were previously filed, it is

ORDERED by the court that the judgment of this Court filed on August 26, 1988, is vacated, and it is

FURTHER ORDERED by the court that the petition for review is denied and, pursuant to 15 U.S.C. § 45(c), the Commission's order under review is hereby enforced.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: DANIEL OLIVER, CHAIRMAN
PATRICK P. BAILEY
TERRY CALVANI
MARY L. AZCUENAGA
ANDREW J. STRENIO, JR.

Docket No. 9171

IN THE MATTER OF

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
AN ASSOCIATION,
RALPH J. PERROTTA
KAREN E. KOSKOFF, AND
REGINALD G. ADDISON,

AS PRVIATE LAW PRACTITIONERS AND AS OFFICERS OR DIRECTORS OF SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, AND

JOANNE D. SLAIGHT, A PRIVATE LAW PRACTITIONER

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to grant the appeal and reverse the initial decision. Accordingly.

IT IS ORDERED, That the findings of fact and initial decision of the Administrative Law Judge be rejected

except as specifically adopted in the findings of fact and conclusions of law contained in the accompanying opinion. The findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

IT IS FURTHER ORDERED, That the following order to cease and desist be, and the same hereby is, entered:

I.

IT IS ORDERED that respondent Superior Court Trial Lawyers Association, an association, its successors and assigns, and its officers, directors and members; Ralph J. Perrotta, individually and as a director of Superior Court Trial Lawyers Association; Karen E. Koskoff and Reginald G. Addison, individually and as officers of Superior Court Trial Lawyers Association; Joanne D. Slaight, individually; and respondents' agents or representatives, directly or through any device, in connection with their activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from entering into, continuing, cooperating in, or carrying out any agreement, understanding, or planned common course of action, either express or implied, to:

A. Refuse to provide legal services to any government program that provides legal services for persons eligible for appointed counsel in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for such legal services;

B. Interfere with the operation of the Superior Court of the District of Columbia or of any court or of any government agency in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

C. Coerce any person not to provide or discourage any person from providing legal services in connection with

any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

D. Encourage, suggest, advise, or induce respondent Superior Court Trial Lawyers Association, any member of Superior Court Trial Lawyers Association, or any other person to engage in any action prohibited by this Order;

Provided that nothing in this Order shall prevent respondents from:

(1) Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures; or

(2) Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.

II.

IT IS FURTHER ORDERED that respondent Superior Court Trial Lawyers Association shall:

A. Distribute by first-class mail a copy of this Order to each of its members, officers and directors within thirty (30) days after this Order becomes final;

B. Distribute by first-class mail a copy of this Order to each person who becomes a member, officer or director of Superior Court Trial Lawyers Association within thirty (30) days of such person's becoming a member, officer or director, during each of the first three (3) years after this Order becomes final; and

C. Within thirty (30) days after the Order becomes final and for ninety (90) days thereafter, post a copy of this Order in each location in which notices of meetings of respondent Superior Court Trail Lawyers Association are customarily posted.

III.

IT IS FURTHER ORDERED that the respondents herein shall within sixty (60) days of service upon them of this Order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied and are complying with this Order, and shall file such other reports of compliance as the Commission may from time to time require.

IV.

IT IS FURTHER ORDERED that each of the individual respondents named herein shall, for a period of five years after this Order becomes final, promptly notify the Commission of the discontinuance of his or her present legal practice, business or employment and his or her affiliation with a new legal practice, business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the legal practice, business or employment in which the respondent is newly engaged. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

V.

IT IS FURTHER ORDERED that respondent Superior Court Trial Lawyers Association shall notify the Commission at least thirty (30) days before any proposed change in its form of organization that may affect compliance obligations arising out of this Order.

By the Commission, Chairman Oliver and Commissioner Strenio not participating.

[SEAL]

/s/ Emily H. Rock
EMILY H. ROCK
Secretary

ISSUED: JUNE 23, 1986

ATTACHMENT:
Opinion of the Commission

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: DANIEL OLIVER, CHAIRMAN
PATRICIA P. BAILEY
TERRY CALVANI
MARY L. AZCUENAGA
ANDREW J. STRENIO, JR.

Docket No. 9171

IN THE MATTER OF

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
AN ASSOCIATION,
RALPH J. PERROTTA
KAREN E. KOSKOFF, AND
REGINALD G. ADDISON,

AS PRIVATE LAW PRACTITIONERS AND AS OFFICER OR DIRECTORS OF SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, AND

JOANNE D. SLAIGHT, A PRIVATE LAW PRACTITIONER.

[The following excerpt from the Federal Trade Commission's Opinion of June 23, 1986 is the only portion of that opinion relevant to this petition for certiorari. The entire opinion can be found at pages 64a to 138a of the Appendix to the petition for certiorari in No. 88-1198, and is also reported at 107 F.T.C. 510 (1986). This excerpt is drawn from pages 132a to 138a of that Appendix, 107 F.T.C. at 599-602.]

OPINION OF THE COMMISSION

By Azcuenaga, Commissioner:

* * * *

III. THE ORDER

We have concluded that the concerted refusal to deal by SCTLA and the individual respondents for the purpose of increasing the CJA fees constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Having found a violation of the Act, the Commission is empowered to enter an appropriate order to prevent a recurrence of the violation. The order must, of course, be reasonably related to the violation found to exist. *See, e.g., F.T.C. v. National Lead Co.*, 352 U.S. 419 (1957); *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608 (1946).

The order in this case narrowly prohibits the respondents from engaging in the conduct that we have concluded was unlawful and recognizes their right under the First Amendment to petition the government. The order requires the respondents to cease and desist from concerted refusals to provide legal representation to any government program that provides such services for indigent criminal defendants in connection with efforts to affect the level of fees paid for such representation. Paragraphs, I.B, I.C and I.D of the order require the respondents ot cease and desist from certain specific practices that they employed to ensure the success of their boycott. These provisions are clearly related to the law violation found to exist and no broader than necessary to prevent a recurrence of the violation.

Paragraph I of the order specifically provides that nothing in the order shall prevent the respondents from exercising their rights under the First Amendment to petition the government concerning any legislation, rules or procedures. Although in our view, the cease and desist provisions of the order are sufficiently narrow that they

do not inhibit the respondents' constitutional right to petition, we include this proviso in the interest of clarity. *See National Society of Professional Engineers v. United States*, 435 U.S. at 697-98 & note 27.

Paragraph II of the order provides that notice of the order be given to the members and officers of the Superior Court Trial Lawyers Association. For the purpose of notifying CJA lawyers who may not have registered their addresses with the SCTLA, the order requires that a copy be posted for a limited time in the same place that SCTLA notices are customarily posted. Paragraphs III, IV and V set forth the respondents' compliance obligations under the order. These provisions are designed to assist the Commission in monitoring compliance with the order and they impose only a minimal burden on the respondents.

The respondents claim, without citing authority for the proposition, that an order should not issue against SCTLA because it is not an "association" within the meaning of Section 4 of the FTC Act, 15 U.S.C. § 44.[146] The law provides that an unincorporated voluntary association is subject to the Commission's jurisdiction. *See National Harness Manufacturers' Association v. FTC*, 268 F. 705, 708-09 (6th Cir. 1920); *see also United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 383-92 (1922). The record shows as a matter of fact that the SCTLA is an association. *See, e.g., Ripon Society v. National Republican Party*, 525 F.2d 567, 571 n.5 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); *Georgia v. National Democratic Party*, 447 F.2d 1271, 1273 n.2 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971).

Although the SCTLA is a loosely knit organization, the Association has officers, holds meetings, collects dues, maintains a bank account and helps to promote the pecuniary and other interests of its members, CJA law-

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[146] R.A.B. at 55-56.

yers.[147] At a minimum, the SCTLA provided a "rallying point" [148] for the 1983 boycott. The officers of SCTLA presented themselves and were perceived as spokesmen for the SCTLA lawyers. The vote to strike if the fees were not increased and the vote to resume work if the city increased the CJA fee to $35 were taken at SCTLA meetings, presided over by SCTLA officers. The Association was integrally involved in the boycott. Although the structure of the SCTLA may vary over time, it has been in existence for at least ten years,[149] and there is no reason to conclude that the SCTLA will not continue to be active as an organization for the interests of the CJA lawyers. We conclude that the SCTLA is an association within the meaning of the Act and that it is appropriate to name the SCTLA in the order.

The respondents also claim that an order against the SCTLA would "pose serious due process problems of notice," [150] because CJA lawyers have no way of knowing whether they are members of the SCTLA or whether they may be held responsible for the acts of others on behalf of the Association. The order, however, does not impose liability merely for the use of SCTLA facilities or for knowledge of the unlawful conduct of another.[151] The respondents would violate the order only if they themselves engaged in concerted action prohibited by the order or if they authorized an agent to engage in such conduct on their behalf. The Association now exists, and it has officers and members. The Commission is empowered to issue an order requiring the respondents to cease and desist from their unlawful conduct, and the order provides for notice to them. We perceive no problem of lack of notice in those provisions.

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[147] I.D.F. 1-4.

[148] I.D.F. 1.

[149] I.D.F. 2.

[150] R.A.B. at 56.

[151] *Id.*

An order is appropriate to prevent a recurrence of the violation. The SCTLA, its members and the individual respondents were active participants in and organizers of the strike. At the time of the hearing, Mr. Perrotta, Ms. Koskoff, and Mr. Addison were officers of the SCTLA. Although Ms. Slaight, the chairperson of the SCTLA strike committee, left CJA practice after the boycott and entered private employment away from Washington, she has since returned to the District and is once again accepting cases under the CJA.

The circumstances that gave rise to the SCTLA lawyers' demands for increased CJA compensation levels have not changed substantially. The record demonstrates that some of the respondents and other CJA lawyers believe that CJA rates are still too low.[152] The Federal CJA fees, as amended in 1984, are now higher than the District's CJA fees. Although legislation has been introduced in the City Council to raise the CJA fees to the levels first demanded by the SCTLA lawyers, the legislation has not been enacted. The CJA lawyers boycotted the CJA program twice before the 1983 boycott.[153] One of the boycotts, like that in 1983, was for the purpose of increasing fees. The other boycott was sparked by complaints that judges were mistreating CJA lawyers, but economic issues emerged as well.[154] The entry of an order is appropriate to prohibit the respondents from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process.

The respondents object also to the entry of paragraph IV of the order, requiring the individual respondents to notify the Commission, for a period of five years, of any

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[152] I.D.F. 65; JX 10, at 80; JX 13, at 128; CX 43B.

[153] JX 6, at 61; O'Neill Tr. 557.

[154] Perrotta Tr. 672; JX 11, at 112-115. The record does not tell us anything more about the previous boycotts.

change in their law practice. According to the respondents, this provision is "pure harassment" and "serves no legitimate purpose." [155] We disagree. The order prohibits concerted action to raise the fees paid by governments under programs to provide counsel to indigent criminal defendants. Because the level of fees for such legal services in other jurisdictions is similar to or lower than the fees in the District of Columbia, the individual respondents may have a financial incentive to engage in similar conduct in other locales. For example, the fees under the federal Criminal Justice Act continued to be $20 to $30 per hour for one year after the SCTLA lawyers had succeeded in raising the District's fee to $35 an hour. In 1983, the fees in Maryland were $20 and $25. The fees in New York, where Ms. Slaight lived for several years after the boycott, were $15 and $25. The maximum in Virginia for a felony case was $400, less than half of the District's $1000 fee.[156] We conclude that this provision of the order also is reasonably related to the violation in this case and appropriate to prevent a recurrence of the violation.

The respondents have demonstrated no recognition that a price-fixing boycott is an unlawful means by which to seek increased reimbursement rates from the government. *SEC v. Savoy Industries, Inc.*, 587 F.2d 1149, 1168 (D.C. Cir. 1978), *cert. denied*, 400 U.S. 913 (1979). Under these circumstances, there is a cognizable risk that the unlawful conduct will be repeated by these respondents absent an order to cease and desist. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1945).

* * * *

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[155] R.A.B. at 59.

[156] CX 38J. This exhibit, showing a state-by-state breakdown of fees for indigent criminal cases, is reprinted in Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 98th Cong., 1st Sess. 240-41 (1983).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Petitioners

v.

FEDERAL TRADE COMMISSION,
Respondent

Before: Silberman and D. H. Ginsburg, Circuit Judges and Robinson, Senior Circuit Judge

ORDER

[Filed May 23, 1990]

Upon consideration of Petitioners' petition for rehearing, filed April 30, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Petitioners

v.

FEDERAL TRADE COMMISSION,
Respondent

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle and Thomas, Circuit Judges

ORDER

[Filed May 23, 1990]

Petitioners' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Petitioners

v.

FEDERAL TRADE COMMISSION,
Respondent

Before: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle and Thomas, Circuit Judges

ORDER

[Filed May 30, 1990]

It is Ordered, by the Court *en banc*, on its own motion, that the order filed by the *en banc* court on May 23, 1990 be, and the same hereby is, amended by adding the following footnote thereto:

Chief Judge Wald did not participate in this order.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Petitioners

v.

FEDERAL TRADE COMMISSION,
Respondent

ORDER

[Filed Oct. 2, 1990]

Before SILBERMAN and D. H. GINSBURG, *Circuit Judges*, and ROBINSON, *Senior Circuit Judge*.

Upon consideration of petitioners' motion for vacatur and reentry by the Court of its order of May 23, 1990, denying petitioners' petition for rehearing, and of the memoranda in support of and in opposition to the motion,

It appearing to the Court that on April 30, 1990, petitioners filed a petition for rehearing of this Court's judgment of March 16, 1990; that on May 23, 1990, the Court entered an order denying the petition for rehearing; that the office of the Clerk of the Court failed to give notice to petitioners or their counsel of the entry of said order; that petitioners did not learn of the entry of said order until August 24, 1990; and that on August 27, 1990, petitioners filed the motion now under consideration; and

The Court desiring to ameliorate, as far as it has power to do so, the omission by the office of its Clerk, without undertaking to gauge the effect, if any, of that

action upon the timeliness of any subsequent application to the Supreme Court of the United States for a writ of certiorari, it is

ORDERED by the Court that its order of May 23, 1990 denying petitioners' petition for rehearing be and hereby is vacated; and it is

FURTHER ORDERED that the Clerk enter forthwith a new order denying petitioners' petition for rehearing.

Per Curiam
For the Court:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1465

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, *et al.*,
Petitioners

v.

FEDERAL TRADE COMMISSION,
Respondent

Before: Silberman and D.H. Ginsburg, Circuit Judges, and Robinson, Senior Circuit Judge

ORDER

[Filed Oct. 2, 1990]

Upon consideration of Petitioners' Petition for Rehearing, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam
For the Court:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk

(2)

No. 90-641

In the Supreme Court of the United States

OCTOBER TERM, 1990

REGINALD G. ADDISON, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

JOHN G. ROBERTS, JR.
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QUESTION PRESENTED

Whether a Federal Trade Commission cease and desist order may properly forbid parties who have engaged in an unlawful horizontal price-fixing agreement from conspiring to induce or encourage others to engage in similar unlawful price-fixing.

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OCTOBER TERM, 1990

No. 90-641

REGINALD G. ADDISON, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion and order of the Federal Trade Commission (reproduced in part at Pet. App. 3a-12a) are reported at 107 F.T.C. 510.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1990. Pet. App. 1a-2a. A petition for rehearing was denied on May 23, 1990. Pet. App. 13a. The order of the court of appeals denying the petition for rehearing was vacated by the court on October 2, 1990, Pet. App. 16a-17a, and a new order denying the petition for rehearing was entered on the same date, Pet. App. 18a. The petition for a

writ of certiorari was filed on October 10, 1990. Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Superior Court Trial Lawyers Association (SCTLA) is an organization of attorneys registered to accept case assignments in the District of Columbia courts under the District's Criminal Justice Act (CJA), D.C. Code Ann. §§ 11-2601 *et seq.* The individual petitioners were among the leaders of a price-fixing boycott that SCTLA conducted in 1983 to induce the District of Columbia government to increase the rate paid to attorneys for representation of indigent criminal defendants under the CJA. See *FTC* v. *Superior Court Trial Lawyers Association*, 110 S. Ct. 768, 770-772 (1990).

The Federal Trade Commission (FTC) issued a complaint charging that the boycott was an "unfair method of competition" under Section 5 of the FTC Act, 15 U.S.C. 45. After hearings before an administrative law judge, an initial decision was entered dismissing the complaint. On administrative appeal, however, the Commission concluded that petitioners' conduct violated Section 5 of the FTC Act, and entered a cease and desist order against petitioners. See *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 562-605 (1986).

The Commission's order directs petitioners to cease and desist from "entering into, continuing, cooperating in, or carrying out any agreement, understanding, or planned common course of action" to: (a) withhold legal services under any government program providing appointed counsel in an effort to increase the price paid for such services; (b) interfere

with the operations of any court in connection with efforts to increase legal service reimbursement rates; (c) "coerce" any person not to provide legal services, or "discourage" any person from providing legal services, in connection with a price-fixing boycott respecting legal services for indigent defendants; or (d) "[e]ncourage, suggest, advise, or induce respondent [SCTLA], any member of [SCTLA], or any other person to engage in any action prohibited by this Order." Pet. App. 4a-5a.[1]

2. Petitioners sought judicial review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals vacated the Commission's decision on the issue of liability and remanded for further consideration of whether petitioners enjoyed market power in the conduct of their boycott. Because the court of appeals vacated the Commission's finding of a violation, it had no occasion to consider petitioners' claim that "the Commission's order is overly broad and not reasonably related to the remedial purposes of the Act." *Superior Court Trial Lawyers Association* v. *FTC*, 856 F.2d 226, 253 (D.C. Cir. 1988), rev'd in part and remanded, 110 S. Ct. 768 (1990).

This Court granted certiorari to review the judgment of the court of appeals, and held that the court

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[1] The order also provides that "nothing in this Order shall prevent respondents from:"

> (1) Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures; or
>
> (2) Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.

Pet. App. 5a.

of appeals had erred to the extent it had rejected the Commission's finding that petitioners had violated Section 5 of the FTC Act. *FTC* v. *Superior Court Trial Lawyers Association*, 110 S. Ct. at 768. The Court explained that petitioners' "concerted action in refusing to accept further CJA assignments until their fees were increased was * * * a plain violation of the antitrust laws," and was not protected by the First Amendment. *Id.* at 778. Accordingly, this Court reversed the judgment of the court of appeals "insofar as that court held the *per se* rules inapplicable to the lawyers' boycott," and remanded the case to the court of appeals for review of petitioners' "objections to the form of the order entered by the Commission." *Id.* at 782 & n.20.

3. On remand, the court of appeals considered petitioners' objections to the Commission's order based on "the parties' briefs, which were previously filed." Pet. App. 2a. By unpublished order dated March 16, 1990, the court enforced the Commission's order in its entirety. *Id.* at 1a-2a. On April 30, 1990, petitioners filed a petition for rehearing and suggestion of rehearing en banc. On May 23, 1990, the court of appeals denied both requests. *Id.* at 13a-14a.

On August 27, 1990, petitioners moved the court of appeals to vacate and reinstate its May 23 denial of rehearing. Petitioners urged that they had received no notice of that denial and if the May 23 order were not vacated "the time for petitioning for a writ of certiorari would have [already] expired." Motion to Vacate and Reinstate Order on the Basis of Lack of Notice at 2 (D.C. Cir. filed Aug. 27, 1990). The Commission opposed this motion. On October 2, 1990, the court of appeals entered a new order vacating its May 23 order denying rehearing, Pet. App. 16a-17a, and issued a new order dated Oc-

tober 2 denying the petition for rehearing. *Id.* at 18a. In taking that action, the court noted that the court of appeals had "failed to give notice to petitioners or their counsel of the entry" of the May 23 denial of rehearing, and that petitioners did not become aware of that order until August 27, 1990. *Id.* at 16a. The court desired to "ameliorate, as far as it has power to do so, the omission by the office of its Clerk [to give notice to petitioners], without undertaking to gauge the effect, if any, of that action upon the timeliness of any subsequent application to the Supreme Court of the United States for a writ of certiorari." Pet. App. 16a-17a.

ARGUMENT

The court of appeals' unpublished decision establishes no precedent,[2] conflicts with no decision of this Court or of any other court of appeals, and, in any event, does not impose the limitations upon petitioners' expression that they claim to find. Accordingly, this Court's review is not warranted.[3]

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[2] Local Rule 11(c) of the D.C. Circuit provides that "[u]npublished orders or judgments, including explanatory memoranda, of this Court are not to be cited as precedents."

[3] There is also substantial reason to doubt that the petition is timely. The court of appeals denied petitioners' petition for rehearing on May 23, 1990; the time limit prescribed by 28 U.S.C. 2101(c) for filing a petition for certiorari was thus August 22, 1990. That statutorily prescribed time limitation is jurisdictional. *Dep't of Banking* v. *Pink*, 317 U.S. 264, 268 (1942). Petitioners suggest their October 19, 1990, petition is nonetheless timely because it was filed within 90 days of the court of appeals' October 2, 1990, order denying rehearing. Pet. 2 & n.2. That order, however, which did not purport to determine the timeliness of any petition to this Court, Pet. App. 16a-17a, may not have tolled the time for filing a peti-

Petitioners' sole contention is that certain provisions in the Commission's cease and desist order run afoul of the First Amendment by regulating speech. Pet. 5-8. Specifically, petitioners object to provisions of the Commission's order that prohibit petitioners from conspiring to "discourage" any person from providing legal services in connection with a price-fixing boycott regarding legal services for indigent persons, or from conspiring to "[e]ncourage, suggest, advise, or induce" any person to engage in the actions prohibited by the order (principally, engaging in the very price-fixing efforts that petitioners themselves conducted). Pet. App. 4a-5a (Order, I.A and D). That attack on the breadth of the Commission's order is misguided. "Having been caught violating the Act, [petitioners] 'must expect some fencing in.'" *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965), quoting *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). As this Court explained in rejecting a First Amendment challenge to a remedial order for a price-fixing violation:

> Having found the Society guilty of a violation of the Sherman Act, the District Court was em-

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tion. Cf. *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1662 (1990) (time for filing a petition is not tolled when a lower court amends its order "solely for the purpose of extending that time"). In the alternative, petitioners move this Court to extend by 60 days the period for filing their petition. Pet. 2-3. As petitioners recognize, their application is untimely under Rule 30.2 of this Court, and the Court will not grant such an untimely application "except in the most extraordinary circumstances." In addition, we are aware of no situation in which this Court has granted an application to extend the time for filing a petition for certiorari, when the application was not filed until after the jurisdictional time limit had expired.

> powered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . ." In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

National Society of Professional Engineers v. *United States*, 435 U.S. 679, 697-698 (1978) (citations omitted).[4] The order here is justified by the same principles—particularly in light of the fact that successful price-fixing activities by their fellow attorneys could, in some cases, provide the same benefits to petitioners that they sought by means of the unlawful conduct redressed by the order.[5]

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[4] In *National Society of Professional Engineers*, a trade association was prohibited from "adopting any official opinion, policy statement or guideline stating or implying that competitive bidding is unethical." 435 U.S. at 697. The association challenged that order as both "an unconstitutional prior restraint on speech and an unconstitutional prohibition against free association." *Id.* at 697 n.25.

[5] Petitioners are wide of the mark in suggesting that the remedial order is inconsistent with this Court's decision on

Petitioners contend (Pet. 6) that the remedial order at issue would "seriously restrict political discourse," but that assertion is based on a misperception about the character and scope of the order. The preamble to Paragraph I of the order makes abundantly clear that its strictures apply only to *concerted* efforts to incite horizontal price-fixing boycotts. Pet. App. 4a. Individual actions are not similarly constrained. Thus, if petitioner Perrotta "should become an elected official" the Commission's order will not bar him from uttering the same "words of encouragement" that petitioners believe they "received from public officials in this case." Pet. 6. Likewise, nothing in the order would prohibit any petitioner from offering his personal "advice" concerning participation in a lawyers' boycott, as did the late Dean Branton of Howard Law School. Pet. 7.

While the order therefore gives petitioners breathing space as individuals "to speak freely on an issue about which they care deeply," Pet. 8, the challenged provisions of the order are avowedly designed to prohibit petitioners from engaging in future conspiracies to incite and further the same type of horizontal price-fixing boycott as they themselves conducted in this case. As the Commission explained, the provisions at issue are "narrow[]" ones, integrally related

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the liability issues in this case. Pet. 5 & n.5. This Court did not consider the limits that may be placed on petitioners' expression as part of a remedial order. See 110 S. Ct. at 782 n.20. Nor does the decision below conflict with any of the court of appeals decisions cited by petitioners. Pet. 7 n.10. Those cases involved particular remedies for misleading commercial speech that the courts of appeals required to be more closely tailored to the scope of the violation. The Commission engaged in such tailoring here. See pp. 8-9 & n.6, *infra*.

to remedying the "law violation found to exist" and intended to sweep "no broader than necessary to prevent a recurrence of the violation." Pet. App. 8a.[6] Cf. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447, 449 (1969) (per curiam) (although a statute may not proscribe "mere advocacy" of unlawful action, the government may regulate advocacy "directed to inciting or producing imminent lawless action and * * * likely to produce such action"). Consequently, the order imposes no undue burden upon the exercise of First Amendment rights by petitioners. If petitioners actually engage in activities they believe are protected by the First Amendment and the Commission contends that the order applies to such activities, there will be time enough to determine the constitutionality of the order's application, and to do so in a concrete factual setting.

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[6] More fully, the Commission explained:

> The order in this case narrowly prohibits the respondents from engaging in the conduct that we have concluded was unlawful and recognizes their right under the First Amendment to petition the government. The order requires the respondents to cease and desist from concerted refusals to provide legal representation to any government program that provides such services for indigent criminal defendants in connection with efforts to affect the level of fees paid for such representation. Paragraphs I.B, I.C and I.D of the order require the respondents to cease and desist from certain specific practices that they employed to ensure the success of their boycott. These provisions are clearly related to the law violation found to exist and no broader than necessary to prevent a recurrence of the violation.

Pet. App. 8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

JAMES M. SPEARS
General Counsel

JAY C. SHAFFER
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel
Federal Trade Commission

DECEMBER 1990

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* The Solicitor General is disqualified in this case.

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No. 90-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REGINALD G. ADDISON,
KAREN E. KOSKOFF,
RALPH J. PERROTTA,
JOANNE D. SLAIGHT,
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
Petitioners

v.

FEDERAL TRADE COMMISSION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The FTC argues that the Order does not overly restrict First Amendment freedoms because it applies only to *agreements* to discourage, encourage, suggest, or advise. But that is no comfort to an elected official who necessarily consults with or communicates through aides. Nor is it much solace to a law school dean who agrees to meet with a delegation of lawyers, knowing that his disinterested advice will be passed back to a larger group, and that the FTC might later seek to infer an implied understanding that the larger group would be so advised. If the FTC is only interested in restricting incitement of imminent lawless conduct (Brief In Opposition at 9), it

should not prohibit as it has a broad range of speech, some of which could be deemed to reflect concerted action not undertaken to incite but rather to influence.

The FTC seeks to uphold the Order because it applies only to concerted action. As this Court has observed, however, collective speech, too, has a value: "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981). Reliance on *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978) for the proposition that a remedial Order may in some instances curtail the exercise of liberties is also misplaced. The Order in *Professional Engineers* was directed against the adoption of *official* opinions, policy statements, or guidelines stating that competitive bidding was unethical, and the avenue of petitioning for modification of the decree before such formal adoption was a practical alternative. *Id.* at 697, 699. The right to seek such modification is no help, of course, in the case of a wholesale ban on casual speech by politically concerned individuals and association members, some of whom do not even have an economic stake in the outcome.

The FTC suggests that the Constitutionality of the Order can be determined "in a concrete factual setting." This is no answer to an order that hangs threateningly over the heads of politically concerned individuals of limited financial resources—or, for that matter, to a group of such individuals. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (deterrence to protected speech is not effectively removed if "the contours of regulation would have to be hammered out case-by-case—and tested only by those hardy enough to risk [sanctions] to determine the proper scope of the regulation.") Nor it is any comfort that the Commission's opinion accompanying the Order may have *said* it was properly tailored and no broader than necessary (Brief in Opposition, at 8-9).

The Order *itself* is an overbroad and unnecessary limitation on political speech.[1]

Contrary to the FTC's assertion in its Opposition, the Court of Appeals' unpublished decision, by reinstating a remedial order which is broader than necessary to establish the desired end, does indeed conflict with decisions of this Court. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 108 (1973) (speech can only be limited when it is directed to inciting or producing imminent lawless conduct); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (limitations on the First Amendment's guarantees will not be sustained when the desired end can be more narrowly achieved). Petitioners therefore respectfully urge that this Court exercise its supervisory powers.

Respectfully submitted,

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[1] The FTC betrays its own concern with the scope of the Order when it takes pains to assure that the Order is not intended to abridge First Amendment rights.